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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 305

WAYNE UNITED GAS COMPANY, a corporation, *Petitioner*,

v.) In Bankruptcy.

OWENS-ILLINOIS GLASS COMPANY, LIBBEY-OWENS-FORD GLASS COMPANY, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, a corporation, and PAUL C. BEARDSLEE, Trustees, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FRED O. BLUE,
ROBERT S. SPILMAN,
Counsel for Petitioner.

LOVETT PRINTING CO., CHARLESTON, W. VA.

SUBJECT INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
I. SUMMARY STATEMENT OF MATTERS INVOLVED	2
(1) Statement of Facts	2
(2) Question Presented	6
II. REASONS RELIED ON FOR ALLOWANCE OF WRIT	6
BRIEF IN SUPPORT OF PETITION FOR CERTIORARI	8
I. OPINIONS BELOW	8
II. JURISDICTION	8
III. STATEMENT OF CASE	9
IV. ARGUMENT	10
(1) A federal District Court has power to set aside a final judgment or decree which it has made and to grant a rehearing after the expiration of the period allowed for appeal therefrom	10
(2) There are no terms in Bankruptcy. A District Court sitting in bankruptcy may set aside any order made by it and grant a rehearing of the matters adjudicated thereby, provided (1) the application for review is seasonably made, and (2) rights have not become vested under the order which will be disturbed by its vacation	13

PAGE

(3) The District Court set aside its order of March 2, 1936, and granted a rehearing in the exercise of a sound judicial discretion and for good cause shown ---------- 17

(4) The decision of the Circuit Court of Appeals for the Fourth Circuit that the District Court, sitting in bankruptcy, had no power to set aside its order of March 2, 1936, and grant a rehearing after the expiration of the period allowed for appeal from that order is in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits upon the same matter---------- 19

(5) The decisions cited by the learned Circuit Court of Appeals for the Fourth Circuit do not sustain such holding ---------- 23

(6) Said Circuit Court has made a ruling as to federal practice that would tend to introduce confusion into the law if unreviewed ---------- 28

V. CONCLUSION ---------- 30

	PAGE
Aspen Mining Co. v. *Billings*, 150 U. S. 31	11
Bonner v. *Potterf*, 47 F. (2d) 852	24
In re Burr Mfg. & Supply Co., 217 Fed. 874	15
Cameron v. *National Surety Co.*, 272 Fed. 874	21
Chicago M. & St. P. Ry. Co. v. *Leverentz*, 19 F. (2d) 915	11
Clarke v. *Hot Springs Electric L. & P. Co.*, 76 F. (2d) 918	11
Conboy v. *First National Bank*, 203 U. S. 141	26
In re Ives, 113 Fed. 911	16
In re Keyes, 160 Fed. 763	16
Memphis v. *Brown*, 94 U. S. 715	19
Morse v. *United States*, 270 U. S. 151	11
Northwestern P. S. Co. v. *Pfeifer*, 36 F. (2d) 5	11
In re Rochester Sanitarium & Baths Co., 222 Fed. 22	22
Roema v. *Neuman*, 132 U. S. 103	11
Sandusky v. *National Bank*, 23 Wall. 289	15
In re Stearns & White Co., 295 Fed. 833	25
Stickney v. *Wilt*, 23 Wall. 150	16
Todd v. *Alden*, 245 Fed. 462	13
United States v. *East*, 80 F. (2d) 134	23
Wayne United Gas Co. v. *Owens-Illinois Glass Co. et al.*, 83 F. (2d) 98	3
West v. *McLaughlin's Trustee*, 162 Fed. 124	19
In re Wright, 96 Fed. 820	16
Zimmern v. *United States*, ... U. S. ....., 80 L. Ed. 742	29
Zimmern v. *United States*, 79 F. (2d) 703	29
Remington on Bankruptcy, sec. 1069	19

PAGE

Act of May 27, 1926, c. 406, sec. 10, 44 Stat. 665; 11 U. S. C. A., sec. 48 6

Act of February 13, 1925, c. 229, sec. 8(c), 43 Stat. 936; 28 U. S. C. A., sec. 347 8

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PETITION FOR WRIT OF CERTIORARI

May it please the Court:

The petition of Wayne United Gas Company, a corporation, respectfully shows to this Honorable Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED

(1)

Statement of Facts

November 25th, 1935, petitioner filed in the District Court of the United States for the Southern District of West Virginia its original petition, and on the 10th day of December, 1935, its amended and supplemental petition for corporate reorganization under Section 77-B of the Bankruptcy Act, as amended.[1]

February 7, 1936, respondents filed their joint and separate objections to the approval of said petitions.

By order entered March 2nd, 1936, (R. 1) the District Court held that said petitions and the plan of reorganization set out therein did not present a feasible method of reorganizing the debtor (this petitioner) and did not adequately or fairly provide for the protection of the rights of the holders of the first mortgage bonds of the debtor, and that the holders of more than 92 per cent of said bonds, (the respondent Glass Companies), had refused to approve or accept said plan, and that said petitions did not comply with the provisions of Section 77-B of the Bankruptcy Act and therefore were not filed in good faith within the meaning of said Act. It accordingly disapproved and dismissed said petitions. (R. 3.)

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[1] The original and amended petitions are incorporated in petitioner's second amended and supplemental petition, post, found at p. 25 of the Record.

Petitioner desiring to appeal from this order, on March 20, 1936, filed its petition for appeal under Section 24(b) of the Bankruptcy Act in the office of the Clerk of the Circuit Court of Appeals, together with its assignment of errors and other necessary papers, that court then being in vacation. On the first day of the first term of said court following the filing of said petition, April 6th, 1936, petitioner appeared before the court and submitted its petition for such appeal, which the respondents resisted. (R. 10.) By its order made April 15th, 1936, (R. 10) the Circuit Court denied the appeal upon the ground that appeal should have been taken as of right under Section 25(a) of the Bankruptcy Act and not upon petition to the Circuit Court of Appeals therefor under Section 24(b). *Wayne United Gas Company* v. *Owens-Illinois Glass Company, et al.*, (C. C. A. 4th) 83 F. (2d) 98.

Two days thereafter, April 17th, 1936, petitioner notified respondents that on April 24th it would present to the District Court its petition praying that the order of March 2nd, 1936, be vacated and that a rehearing or review of all matters arising in said proceeding be awarded petitioner because of alleged errors set forth in its assignment of errors tendered with said petition (R. 4), and that upon rehearing an order be entered by the District Court awarding petitioner the relief prayed in its original and amended petitions.

By order made April 24, 1936, the District Court directed the petition for rehearing to be filed, and after hearing argument of counsel thereon, took time to con-

sider its judgment. (R. 4.) By order entered May 12, 1936, the District Court vacated its order of March 2, 1936, and granted the rehearing and review prayed by petitioner, setting May 22, 1936, for a hearing "on all questions arising on the record". The District Court found "that good cause exists justifying this court in the exercise of a sound judicial discretion in setting aside, vacating and annulling" the order of March 2, 1936, "and in granting to the said Wayne United Gas Company, the above named debtor, a rehearing of all the issues and matters arising in the above styled proceeding upon the alleged errors set forth in the assignment of errors presented with the aforesaid petition and upon the record in this proceeding". (R. 18.) The court also found that the debtor's petitions to vacate said order of March 2, 1936, and for a rehearing of the matters decided thereby "have been properly and seasonably presented in this cause, and that no rights have become vested under said order * * *" of March 2, 1936, "which will be disturbed by the vacation of said order * * *." (R. 18.)

In its order of May 12th, upon motion of respondents, the District Court certified that a regular term began at Charleston, where the Court was sitting, on April 21, 1936. (R. 19.)

On May 22, 1936, petitioner, by leave of court, filed its second amended and supplemental petition (R. 25), which incorporated in full its first amended and supplemental petition (R. 26), which latter included the original petition. The respondents appeared and resisted petitioner's motion, upon this rehearing, for the approval

of its several petitions and its plan of reorganization, as amended, set forth therein.

By order entered May 28, 1936, the District Court, after full argument, overruled petitioner's motion to approve said petitions and to set a day for hearing upon its proposed plan of reorganization, sustained respondents' objections to said petitions, and disapproved and dismissed the same, for reasons expressed in ten findings of fact and law made by the court, contained in said order. (R. 19.)

June 11, 1936, petitioner's petition for an appeal under Section 25(a) of the Bankruptcy Act from said decree of May 28, 1936, to the Circuit Court of Appeals for the Fourth Circuit, with supersedeas, was granted by the Judge of the District Court and duly perfected (R. 62).

On July 1st, the motion of the appellees, Owens-Illinois Glass Company and others (the respondents here), to dismiss said appeal was argued before the Circuit Court, which by decree entered July 4th sustained the motion and dismissed the appeal (R. 60) upon the ground that the District Court had no power to grant a rehearing and set aside the order of March 2nd after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act. See Per Curiam opinion (R. 58).

This petition is for a writ of certiorari to review the action of the Circuit Court of Appeals in thus dismissing petitioner's appeal.

(2)

Question Presented

The question in this case is whether the District Court had power (jurisdiction) to set aside its order dismissing said petitions for corporate reorganization under Section 77-B of the Bankruptcy Act as amended, and to grant a rehearing, after the expiration of the thirty-day period allowed for appeal from that order by Section 25(a) of the Bankruptcy Act. (Act of May 27, 1926, c. 406, sec. 10, 44 Stat. 665; 11 U. S. C. A., sec. 48.)

II.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

(1)

The decision of the Circuit Court of Appeals for the Fourth Circuit that a District Court sitting in Bankruptcy "is without power to grant a rehearing and set aside" an order previously entered by it "after the expiration of the period allowed for appeal from that order" is in conflict with decisions of the Circuit Courts of Appeals of the Sixth, Eighth and Second Circuits on the same matter.

(2)

Said Circuit Court of Appeals has decided an important question of federal practice in a way in conflict with the weight of authority and the applicable decisions of this Court.

(3)

Said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of this Honorable Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in this cause, numbered and entitled on its docket No. 4080, Wayne United Gas Company, a corporation, Appellant, v. Owens-Illinois Glass Company, Libbey-Owens-Ford Glass Company, The Chase National Bank of the City of New York, a corporation, and Paul C. Beardslee, Trustees, Appellees, or the material parts of such Record, and that said decree of the Circuit Court of Appeals for the Fourth Circuit, entered in this proceeding July 4, 1936, dismissing petitioner's said appeal, may be reversed, and that petitioner may have such other and further relief in the premises as to your Honorable Court may seem meet and just.

And your petitioner will ever pray.

FRED O. BLUE,
ROBERT S. SPILMAN,
Counsel for Petitioner.

Date: August 12, 1936,
Charleston, West Virginia.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINIONS BELOW

No opinion was filed by the District Court (McClintic, J.).

The findings of the District Court as to the propriety of vacating its order of March 2, 1936, and of granting a rehearing, are contained in the court's order of May 12, 1936 (R. 18). And its reasons, upon rehearing, for overruling petitioner's motions and dismissing its petitions for reorganization are set forth in its findings of fact and law, contained in its order of May 28, 1936 (R. 19).

The opinion of the Circuit Court of Appeals, (Judges Parker, Northcott and Soper) Per Curiam, was filed July 4, 1936. This opinion is not yet reported. It is found at p. 58 of the Record.

II.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1935, Chap. 229, 43 Stat. 936; 28 U. S. C. A. Sec. 347.

The decree of the Circuit Court of Appeals dismissing petitioner's appeal was entered July 4, 1936 (R. 60).

III.

STATEMENT OF THE CASE

The material facts, with appropriate page references to the printed Record, are stated in the Petition, *supra*, pages 1 to 7, inclusive.

A summary of the argument appears in the subject index.

The error intended here to be urged is:

The action of the Circuit Court of Appeals in holding that the District Court was without power to grant a rehearing and set aside its order of March 2nd, 1936, after the expiration of the period allowed for appeal from that order; and in consequence thereof;

(a) That the order of the District Court appealed from, entered May 28th, 1936, upon rehearing, as well as that court's order of May 12th, 1936, setting aside its order of March 2nd, was void;

(b) That the effect of these orders was merely to extend the time for appealing from the order of March 2nd;

(c) That petitioner's appeal from said order of May 28th should be dismissed as though it had been taken from the order of March 2nd; and

(d) That the cases cited in its opinion furnish authority for such procedure.

IV.

ARGUMENT

(1)

A federal District Court has power to set aside a final judgment or decree which it has made and to grant a rehearing after the expiration of the period allowed for appeal therefrom.

It is clear, we submit, under the federal decisions that an unsuccessful litigant in a District Court may exercise either of two rights to obtain a review of its judgment or decree against him: (1) He may appeal to the proper appellate court, usually the Circuit Court of Appeals, within the time prescribed by the appropriate federal statute for such appeal; or (2) he may apply to the District Court which made the judgment or decree of which he complains to set it aside and grant him a rehearing within the period prescribed by appropriate rules or decisions of the Federal Courts for such review.

The limitation imposed by law for taking the one or the other of these two courses is not the same. It has long been settled that a party seeking review of either a judgment at law or a decree in equity may for good cause shown have such judgment or decree set aside and a rehearing of the matters adjudicated thereby granted him by the District Court after the period of three months from the entry thereof prescribed by the federal statute for appeal to the Circuit Court of Appeals (Act of February 13, 1925, C. 229, Sec. 8(c); 28 U. S. C. A., Sec. 230) has expired, provided application is made to the

District Court and entertained by it at the same term at which such judgment or decree is entered. *Morse* v. *United States,* 270 U. S. 151, 154. This right is "in no way controlled by the fact that the time for appeal has expired". *Northwestern P. S. Co.* v. *Pfeifer,* (C. C. A. 8th) 36 F. (2d) 5, 8. If the District Court, in the exercise of a sound discretion grant the application to review its own order and to this end sets aside such order, its judgment or decree made upon the rehearing becomes the final order in the case, and the time for taking an appeal runs not from the date of the original order but from the date of entry of the order made upon rehearing. *Aspen Mining Co.* v. *Billings,* 150 U. S. 31, 36; *Clarke* v. *Hot Springs Electric L. & P. Co.,* (C. C. A. 10th) 76 F. (2d) 918, 921. A party who permits the time for appeal to expire before applying to the District Court for rehearing, even though this be done within the term, takes the chance of losing all remedy by appeal; for if the District Court, in its discretion, deny his motion (at law) or his petition (in equity) for a rehearing, no appeal lies from its order denying the rehearing. *Roema* v. *Neuman,* 132 U. S. 103, 106. And the mere filing of the motion or petition, after the time for appeal has expired, does not toll the limit prescribed by statute for taking the appeal. *Chicago M. & St. P. Ry. Co.* v. *Leverentz* (C. C. A. 8th) 19 F. (2d) 915, 917. The Circuit Court of Appeals for the Eighth Circuit, in the case last cited, in dismissing an appeal taken from an order of the District Court *denying a new trial*, made after the expiration of three months from the entry of its final judgment, quoted with approval the following holding of the District Court sustaining the power of that court

to entertain a motion for rehearing after the time for appeal had expired:

> "Notwithstanding a defeated party may have lost the right to bring error, he may, under the rules, still have the right within the term to make a motion for a new trial, and to have the benefit of the court's judgment thereon. If the court shall grant the motion, a new trial will follow. If the court shall deny the motion, there is no remedy. The privilege of presenting a motion for a new trial and of having it heard and determined on its merits, *even after the time within which to sue out a writ of error has expired, is a valuable right.* There is no authority for denying it in this case. The motion for a new trial should, therefore, be considered on its merits."[2]

And in *Clarke* v. *Hot Springs Electric L. & P. Co., supra,* the Circuit Court of Appeals for the Tenth Circuit, after sharply contrasting the situation where a petition for rehearing is filed within the term, but before the time for appeal has expired, with that where the petition is filed within the term but after the expiration of such period, said as to the latter:

> "* * * A petition for rehearing cannot resurrect a right of appeal which has expired. If filed within the term, even after the time for appeal has expired, the trial court may grant it, thus vacate the decree, and start again, but if the rehearing is denied, the original decree stands, and the right of appeal is not revived. All this has been carefully spelled out by the courts." (Citing *Conboy* v. *First Nat. Bank,* 203 U. S. 141, and other authorities.)

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[2] All italics in this brief are ours.

The *power* or *jurisdiction* of the District Court in the exercise of its discretion to set aside its judgment or decree and grant a rehearing after the time prescribed for appeal therefrom has expired, upon timely application, cannot, we submit, reasonably be doubted. The same power has frequently been exercised in bankruptcy proceedings, with the same effect. In denying a motion to dismiss an appeal, the Circuit Court of Appeals for the Eighth Circuit held in *Todd* v. *Alden* (C. C. A. 8th) 245 Fed. 462:

> "Where, after an order allowing a claim in bankruptcy, a rehearing is *granted*, the time for taking an appeal is extended, and runs from the time the order is made final."

(2)

There are no terms in Bankruptcy.

A District Court sitting in bankruptcy may set aside any order made by it and grant a rehearing of the matters adjudicated thereby, provided (1) the application for review is seasonably made, and (2) rights have not become vested under the order which will be disturbed by its vacation.

When Congress passed the first Bankruptcy Act of 1867, it conferred upon the District Courts the administration thereof. Since bankruptcy was a purely statutory creation, and fundamentally at variance with common law principles, it was recognized that certain rules of procedure which had their origin in the common law had no application to bankruptcy proceedings. It was

early decided that the District Courts sitting in bankruptcy knew no terms, and accordingly their power over their own proceedings was unaffected by rules and principles which limited the power of the same courts sitting at law or in equity to review their own orders only within prescribed terms of the court.

It does not follow, of course, that no limitation is imposed by federal law upon the power of the District Court sitting in bankruptcy to grant rehearings. The limitation, as early stated by this court and consistently followed, is that the rehearing must be granted upon application seasonably made, and that it must appear that rights have not become vested under the order sought to be reviewed which will be disturbed by its vacation. It has never been held, so far as we can find, that application for a rehearing in bankruptcy must be made at the same term of court at which the order sought to be reviewed was entered.

We are concerned here with the narrow question of the power of the District Court to review its order dismissing a "petition for corporate reorganization under Section 77-B of the Bankruptcy Act as amended", after the time for appeal from that order had expired and after the term at which the order was entered had ended. (Opinion of Circuit Court herein, R. 58.) In its opinion rendered April 15, 1936, denying petitioner an appeal under Section 24(b), the same court held that the order of the District Court (of March 2nd, 1936) dismissing said petition for reorganization is "the equivalent for procedural purposes of a judgment refusing to adjudge

petitioner a bankrupt". *Wayne United Gas Co.* v. *Owens-Illinois Glass Co. et al.*, (C. C. A. 4th) 83 F. (2d) 98. The question now under consideration is whether the District Court, sitting in bankruptcy, has *power* to review this order after a new term of court has commenced.

We think the applicable principle was thus stated in *Sandusky* v. *National Bank*, 23 Wall. 289, 293 (1874):

> "* * * The district court, for all the purposes of its bankruptcy jurisdiction, is always open. *It has no separate terms.* Its proceedings in any pending suit are, therefore, at all times open for reexamination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation."

Following the Sandusky case the Court of Appeals for the Second Circuit in *In re Rochester Sanitarium & Baths Co.*, (C. C. A. 2nd) 222 Fed. 22, 26, held:

> "There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered."

The same court in *In re Burr Mfg. & Supply Co.*, (C. C. A. 2nd) 217 Fed. 16, 18, said, in answer to the argument that a confirmation order having been made at one term and the order vacating it at another presided over by

another judge, the court had no power to vacate its original order:

> "It is, of course, true that as a general rule the power of the court to modify its orders expires with the term. But there are no terms in bankruptcy, and the principle which the learned counsel invokes that a court has no power to vacate its order other than at the term in which it was granted is inapplicable to the facts of this case."

To the same effect, among numerous other cases, are:

> *Stickney* v. *Wilt*, 23 Wall. 150, 164;
> *In re Ives*, (C. C. A. 6th) 113 Fed. 911, 913;
> *In re Wright*, (D. C. D. Mass.) 96 Fed. 820;
> *In re Keyes*, (D. C. D. Mass.) 160 Fed. 763, 764.

It is submitted that the action of the District Court in the case at bar is sustained by the doctrine of the Sandusky case and the line of federal decisions which has followed it. Although application for rehearing was made after the time for appeal from the court's original order of March 2nd had expired, and within a few days after the term ended, the District Court found: (1) That petitioner's application and motion "have been properly and seasonably presented in this cause", and (2) that "no rights have become vested under said order or decree entered herein on March 2nd, 1936, which will be disturbed by the vacation of said order or decree" (R. 18).

Neither of these findings has been or can be challenged.

(3)

The District Court set aside its order of March 2, 1936, in the exercise of a sound judicial discretion and for good cause shown.

The District Court did not act upon petitioner's application without mature consideration. On April 24th, after due notice to respondents, petitioner filed its petition to set aside the order of March 2nd "because of error in said order or decree upon the grounds set forth in the assignment of errors presented therewith" (R. 6). Petitioner pointed out specifically numerous respects in which it conceived the District Court erred in its order of March 2nd in holding that the plan of reorganization submitted by petitioner did not comply with the provisions of Section 77-B, and was not filed in good faith. After full argument, and consideration of the matter for three weeks, the court found, as set forth in its order of May 12th,

> "that good cause exists justifying this court, in the exercise of a sound judicial discretion, in setting aside, vacating and annulling the aforesaid order or decree entered by this court in the above styled proceeding on the 2nd day of March, 1936, and in granting to the said Wayne United Gas Company, the above named Debtor, a rehearing of all the issues and matters arising in the above styled proceeding upon the alleged errors set forth in the assignment of errors presented with the aforesaid petition, and upon the record in this proceeding."[3]

[3] The Circuit Court of Appeals for the Seventh Circuit has recently held, *In re Georgian Hotel Corporation*, 82 F. (2d) 917, 920 (March 31, 1936), that the fact that a receivership suit was pending in a state court, which had rendered a decree of foreclosure, did not deprive the bankruptcy court of jurisdiction of a reorganization proceeding under Section 77-B.

Argument of the questions arising upon the rehearing was set by the same order for May 22nd. On that day the petitioner filed its second amended and supplemental petition for reorganization, amending its former plan in important respects more favorable to the first mortgage bondholders. The hearing on May 22nd, as shown by the order of the court entered thereon on May 28th, was in no sense perfunctory or merely formal. This order shows (R. 19) that the court went thoroughly and carefully into the merits of petitioner's motion. It made ten separate findings of law and fact upon the record then before it, including petitioner's second amended and supplemental petition that day filed. The court's conclusion, in view of its findings, was "to dismiss the Debtor's several petitions". It stayed the effect of its order for thirty days to enable the Debtor to appeal therefrom. The instant appeal was taken and perfected well within the thirty-day period, namely, on June 11, 1936 (R. 62).

It is submitted, in these circumstances, that the mere fact that the District Court upon rehearing reached the same ultimate conclusion that it had reached upon its former hearing on March 2nd *does not destroy its power or jurisdiction to grant the rehearing*, or even show any abuse of judicial discretion. (*West* v. *McLaughlin's Trustee*, (C. C. A. 6th), 162 Fed. 124, 125, post (4).)

The learned Circuit Court apparently attached controlling weight to the fact that the ultimate result of the rehearing was the same as that of the original hearing, and from this deduced the conclusion that the sole pur-

pose of the District Court in granting the rehearing was to restore petitioner's right of appeal from the order of March 2nd. This, we submit, is in conflict with the Record, by which alone courts speak.

(4)

The decision of the Circuit Court of Appeals for the Fourth Circuit that the District Court, sitting in bankruptcy, had no power to set aside its order of March 2, 1936, and grant a rehearing after the expiration of the period allowed for appeal from that order is in conflict with decisions of the Circuit Courts of Appeals for the Sixth, Eighth and Second Circuits on the same matter.

1. *West* v. *McLaughlin's Trustee,* (C. C. A. 6th) 162 Fed. 124, 125.

In this case a rehearing was granted by the District Court after the time for an appeal from a final order had expired under Section 25(a) of the Bankruptcy Act. The District Court, upon the rehearing, reached the same conclusion it had reached upon the former hearing. An appeal was taken from the order upon rehearing. The Circuit Court of Appeals overruled appellee's motion to dismiss the appeal. After stating that it could not accept the contention sustained by some decisions[4] that it would not be an *abuse of the discretion* of the court to set

[4] *Memphis* v. *Brown,* 94 U. S. 715, 718; *Sage* v. *Central R. Co.,* 93 U. S. 412, 419; *Stickney* v. *Wilt,* 23 Wall. 150, 164; *In re Hudson Cloth ng Co.,* (D. C. Me.) 140 Fed. 49, 50; *In re Wright,* (D. C. Mass.) 96 Fed. 820; Remington on Bankruptcy, Sec. 1069; hold that a court may set aside its order and grant a rehearing for the sole purpose of restoring a right of appeal which has been lost without culpable neglect by expiration of the period limited for taking it.

aside an order for the *sole purpose* of extending the time for an appeal, the court said:

> "* * * The record shows that it was not a mere proposition to evade Section 25(a) that induced the court below to set aside its order in this instance, but that it was done in order to have further investigation, and the learned judge of the District Court not only reaffirmed the questions involved, but more elaborately stated his views thereon. *The fact that he again arrived at the same conclusion did not neutralize his power to grant the rehearing, though some concession to the supposed hardship of the case may have had weight with him.* Having reached the conclusion that there was no abuse of the court's discretion in granting the rehearing, the motion to dismiss the appeal will be denied."

The same essential facts stated in the above quotation from the West case are present here. It is certainly true in the case at bar that the judge of the District Court "more elaborately stated his views" upon the rehearing of May 28th than upon the original hearing of March 2nd. It is as true here as in the West case that "the fact that he (the District Judge) again arrived at the same conclusion" upon the rehearing as upon the original hearing "did not neutralize his power to grant the rehearing". It is, of course, as impossible here as it was in the West case to negative the argument that "some concession to the supposed hardship of the case may have had weight with him". But granting this, there is ample justification here, as there, for holding "that there was no abuse of the court's discretion in granting the rehearing".

2. *Cameron* v. *National Surety Co.* (C. C. A. 8th) 272 Fed. 874, 875.

The District Court, on July 1, 1920, set aside an order entered May 17, 1920, adjudging the appellant a bankrupt upon motion made after the time for taking an appeal from the original order (then ten days) had expired. In overruling a motion to dismiss the appeal the court said:

> "* * * The petition to vacate the order of May 17, 1920, was filed June 1, 1920. It is therefore claimed that, the petition to vacate not having been filed within the time allowed for an appeal from the first order, and the *order appealed from being the same as the first order,* the time for taking an appeal had expired when the present appeal was taken. We think that this contention is unsound, in view of the record before us. The order of June 1, 1920, provided that the order of May 17, 1920, 'be and the same is hereby in all things set aside.' The order of August 19, 1920, from which the appeal was taken, does not affirm the order of May 17, 1920, nor refer to it, but is an independent order made upon the pleadings and proofs; so we are of the opinion that on the record as it stands, the order appealed from was the only order in existence and that the time for taking an appeal ran from its date. The appeal was allowed August 20, 1920. The order vacating the first order was not appealed from and is conclusive on this appeal. *We therefore have jurisdiction. Todd* v. *Alden,* 245 Fed. 462, 157 C. C. A. 624."

3. *In re Rochester Sanitarium & Baths Co.* (C. C. A. 2nd) 222 Fed. 22, 26.

Here the Circuit Court of Appeals for the Second Circuit, upon appeal from an order granting a rehearing entered after the time for appealing from the original order had expired, and also after the term of court at which it was entered had ended, said, after stating that the power to vacate judgments is inherent in courts of general jurisdiction:

> "But the power is to be exercised by the court which rendered the judgment, and none other can take cognizance of the application. And a motion to set aside a judgment is addressed to the sound legal discretion of the court, and its determination of the matter is not disturbed on appeal *unless it is plain that its discretion has been abused*. The greater power includes the less, and the common-law rule is that a court has entire control over its own orders, and may vacate them at any time during the term at which they are made. (Citing authorities.) There are no terms of court in bankruptcy, so that an adjudication of bankruptcy, it is held, may be vacated after the expiration of the term wherein it was entered."

To the same effect are:

Todd v. *Alden* (C. C. A. 8th) 245 Fed. 462, *supra*;
In re Burr Mfg. Co. (C. C. A. 2nd) 217 Fed. 16, *supra*;
In re Ives, (C. C. A. 6th) 113 Fed. 911, *supra*;
In re Keyes, (D. C.) 160 Fed. 763, *supra*.

(5)

It is respectfully submitted that the decisions cited by the Circuit Court of Appeals for the Fourth Circuit do not sustain its proposition "that the court below was without power to grant a rehearing and set aside the order of March 2nd after the expiration of the period allowed for appeal from that order". (Opinion, R. 58.)

Three cases are referred to as sustaining this holding, namely:

(1) *United States* v. *East* (C. C. A. 8th) 80 F. (2d) 134, 135. In this case some three months after the claim of the Government for taxes had been denied by the District Court it filed a petition to review the order denying its claim on the ground that a rehearing was necessary to enable the Government to take an appeal in the event it should decide to do so. The Government's petition was presented ex parte and was granted on the same day it was made. The District Court in its order made the finding that "on January 13, 1933, upon petition filed on that day, the court granted a rehearing *for the purpose of enabling the United States of America to perfect an appeal to the Circuit Court of Appeals*". By the same order the District Court denied the petition. Upon this finding and record the Circuit Court of Appeals for the Eighth Circuit dismissed the appeal. This record is essentially different from that in the instant case. So far from the record here showing that the rehearing was granted by the District Court for the sole purpose of enabling petitioner to perfect an appeal, the record is that the rehearing was granted in order to en-

able the court more fully to consider the correctness of its former decision in the light of the assignments of error thereto, specifying errors complained of by petitioner.

In the East case the order granting the rehearing was made ex parte without argument of counsel and without any reason being assigned by petitioner or considered by the court for the propriety thereof, except the Government's necessity that the former order be set aside and re-entered in order to enable it to take an appeal. The present record shows the exact opposite in all these particulars. It is therefore submitted that the instant case is ruled not by the East decision, but by the decision of the same court (C. C. A. 8th) in *Cameron* v. *National Surety Co., supra.*

(2) *Bonner* v. *Potterf* (C. C. A. 10th) 47 F. (2d) 852, 855.

The point ruled in this case is not that the trial judge lacked power to grant the rehearing, but that his action was "beyond the sound discretion of the court". In granting the rehearing after the time for appeal had expired, the District Court made an order containing the following finding:

> "I find that the motion of W. M. Bonner to reopen this case should be overruled and an order to that effect will be entered at Muskogee on November 6, 1929. The order of January 17, 1929, overruling exceptions will be reentered on November 6, 1929, (so) as to give Bonner opportun-

> ity to appeal the test question as to whether it is final order, etc., and seek a review on order of court overruling exception."

In sustaining a motion to dismiss an appeal from this order, the Circuit Court held that it conclusively appeared from the record that the trial judge merely attempted to reenter the original order for the purpose of allowing an appeal from it, the new order incorporating the old one, and that it did not appear that the trial judge in any way reconsidered his former action in making a new order. Its conclusion was:

> "It is therefore apparent that this action of the court was simply a reentry of the original order for the sole purpose of saving the rights of the appellant in regard to appeal which, under such circumstances, *is a matter, beyond the sound discretion of the court, and amounts to an ineffective gesture to revive the right to appeal.*" (p. 855.)

(3) *In re Stearns & White Co.* (C. C. A. 7th) 295 Fed. 833, 837.

Here the bankrupt, on April 12th, moved the District Court to vacate orders entered by it on February 3rd and 28th allowing a claim against it for approximately $17,000 for the express purpose of reinstating the right of appeal which had been lost. The court by an informal ex parte order entered on the same day, April 12th, vacated its two prior orders and again denied the bankrupt relief, this action being taken solely for the purpose of restoring the right to appeal. This clearly appears from the District Court's order of April 12th, reading as follows:

> "Orders of February 3rd and 28th vacated—petn. of Stearns & White to review order of F. L. Wean of July 11, 1932, denied—and order of referee affirmed." (p. 834.)

The record in the Stearns & White case was substantially the same as the record in the East and Bonner cases. In all three the record showed that the rehearing was granted ex parte and without consideration either of the merits of the motion or the possibility of error in the court's former order, and for the sole purpose of allowing an appeal to be taken from that order. However, in the Stearns & White case the court, in dismissing the appeal, said that the District Court was without power to grant the rehearing, instead of grounding its action upon an erroneous exercise of discretion by the District Court,—as in the East and Bonner cases. In this respect the learned court, it is submitted, proceeded on a misconception of the holding of this court in *Conboy* v. *First National Bank*, 203 U. S. 141, by saying:

> "The Conboy case very conclusively holds that, where there is no petition for rehearing or other action taken within the time allowed for the appeal, nothing done thereafter can be of any avail." (p. 840.)

All that the Conboy case decided was that the *mere filing* in a Circuit Court of Appeals of a petition for rehearing, which was *denied,* did not extend the time for taking an appeal to this Court from the order of the Circuit Court sought to be reviewed. By waiting until after the time for appeal had expired, the petitioner took the risk of losing his right of appeal. If his petition for

rehearing had been granted, the former order against him would have been superseded by the order granting the rehearing, and the time for appeal would have run from the order granting the rehearing under the authorities hereinbefore cited (ante, p. 19 *et seq.*). But where the petition for rehearing was denied (which was the result in the Conboy case), two consequences followed: (1) No appeal could be taken from the order denying the rehearing because the allowance thereof was discretionary with the Circuit Court to which the application was addressed; and (2) the mere application for a rehearing did not enlarge the time for taking an appeal from the original order. That this is the substance of the ruling in the Conboy case appears from the court's holding therein:

> "No appeal lies from orders *denying* petitions for rehearing which are addressed to the discretion of the court and designed to afford it an opportunity to correct its own errors." (203 U. S. at p. 145.)

The court in the Conboy case declined to decide what would have been the effect upon petitioner's right to appeal if his petition for rehearing had been granted. That it deliberately left this question open appears from the final paragraph of its opinion:

> "The petition was denied. Whether it could have been granted in view of the terms and spirit of the Bankruptcy Act, or the effect, if it had been, we are not called upon to discuss." (203 U. S. at p. 146.)

There are a number of decisions which correctly apply the doctrine of the Conboy case by holding that no appeal lies from an order of a District Court *denying* a motion to vacate a prior order and grant a rehearing where such motion is made after the time limited for taking an appeal from the first order has expired.[5] All of these cases proceed upon the principle that if a party permit the time limited for his appeal to expire before moving to vacate the adverse order, the mere filing of his motion does not restore the right to an appeal which has already been lost, and if the motion be denied no appeal lies from the order denying the rehearing. That this is not the situation presented by the record in the instant case is apparent.

(6)

The Circuit Court of Appeals for the Fourth Circuit has made a ruling as to federal practice that will tend to introduce confusion into the law if unreviewed.

The question of practice involved here is important. The Circuit Court has not based its opinion on the ground that the District Court *abused* its power, but on the ground that the District Court *"was without power to grant a rehearing"*. If the opinion of the Circuit Court in the instant case be unreviewed, the power of the District Courts in the Fourth Circuit sitting in bankruptcy to review their own orders is limited to an extent not imposed upon District Courts in other circuits.

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[5] These include such cases as *Morgan* v. *Benedum*, (C. C. A. 4th) 157 Fed. 232; *Rode & Horn* v. *Phipps* (C. C. A. 6th) Fed. 414; *Ewing* v. *Russel Hdwe. Co.* (C. C. A. 8th) 287 Fed. 545; *Foster* v. *McMasters*, (C. C. A. 8th) 15 F. (2d) 751.

This Court, in *Zimmern* v. *United States,* ..... U. S. ....., 80 L. Ed. 742, (Adv. Ops. Oct. Term, 1935, p. 742; decided April 27, 1936) reviewed and reversed a ruling of the Circuit Court of Appeals for the Fifth Circuit in order to avoid confusion upon a related question of practice.

The District Court, in the Zimmern case, which was a proceeding in equity to cancel certain deeds, extended a term of court for the avowed purpose of modifying or amending its final decree. One of the defendants filed a petition for rehearing "when the time to appeal had already gone by, if the original decree was then presently in force", (p. 743).. The Circuit Court of Appeals for the Fifth Circuit dismissed the appeals upon the ground that:

> "Motion for rehearing filed in trial court *after expiration of three months from final decree came too late,* and was ineffective to extend time for taking appeal."

Zimmern v. *United States* (C. C. A. 5th) 79 F. (2d) 703.[6]

This Court granted certiorari upon the ground that the decree of the Circuit Court was a ruling as to practice "that might tend, if erroneous, to introduce confusion into the law" (p. 774). In reversing the Circuit Court, this Court noted that under the applicable statute (U. S. C. A., Title 28, Sec. 230) the appeals of the defendants were too late if the time is to be computed from

[6] Rehearing denied, 80 F. (2d) 993.

the date of the decree as originally entered, but they were regular if the time is to be computed from the date of the amendment, and said:

> "The judge had plenary power while the term was in existence to modify his judgment for error of fact or law, or even revoke it altogether."

The Circuit Court of Appeals for the Fourth Circuit, by its decision in the instant case, has narrowed the power of the District Judge by imposing limitations not recognized in other Circuits and inconsistent with established rules of federal practice approved by this Court. We submit that its ruling should be reviewed for the reason that it "will tend, if erroneous, to introduce confusion into the law".

V.

CONCLUSION

It is submitted that this case calls for the exercise by this Court of its supervisory power in order that the conflict noted between the decision herein and the decisions of the Circuit Courts of Appeals of other circuits, and the question of federal practice involved, may be settled by this Court; and to such end that a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Fourth Circuit and finally reverse it.

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